

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE:

B-219004

DATE: December 17, 1985

MATTER OF:

Commander Milton J. Stewart, USCG
(Retired)

DIGEST:

A retired Coast Guard officer's application for waiver of his debt to the United States arising out of overpayments of military retired pay is denied, where it appeared that he was furnished with written notice that his normal net monthly pay entitlement was \$1,440, but he was actually paid \$1,600 per month and failed to report the discrepancy. Under the governing provisions of statutory law, a grant of waiver of a debt arising out of overpayments of military pay may not be allowed if there is an indication that the concerned service member either knew or should have known that an error existed, and failed to take appropriate corrective action.

Commander Milton J. Stewart, United States Coast Guard (Retired), requests reconsideration of the denial by our Claims Group of his application for a waiver of his debt to the United States in the amount of \$30,398.91 arising out of overpayments of military retired pay he received between April 1976 and May 1984. In light of the facts presented, and the applicable provisions of law, we sustain the denial of waiver.

Background

Commander Stewart retired from the Coast Guard in 1975 after completing more than 30 years of active duty with the Navy and the Coast Guard. He then began drawing military retired pay based on the rate of active duty basic pay to which he had been entitled immediately before his retirement.

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In October 1975 Congress enacted the "Tower Amendment"^{1/} to alleviate the so-called "retired pay inversion" problem, which had been created by the fact that for several years upward Consumer Price Index adjustments to military retired pay had occurred in greater amounts and at greater frequency than increases in active duty military basic pay. The result of this was that many of those who remained on active duty after becoming eligible for retirement were losing retirement pay. The Tower Amendment provided an alternate method of calculating military retired pay based, not on the affected service members' actual retirement date, but rather on their earlier eligibility for retirement.

Several months after the enactment of this amendment, the Coast Guard recomputed Commander Stewart's retired pay under this alternate method and then sent him a single-page document captioned:

"RETIRED PAY RECOMPUTATION WORK SHEET
BASED ON THE RETIRED PAY INVERSION LEGISLA-
TION (TOWER AMENDMENT)."

This document contained information advising him that his retired pay had been recalculated on the basis of his October 1972 rate of active duty basic pay with subsequent Consumer Price Index adjustments. The document then provided the following information:

"YOUR March 1976 RETIRED PAY INCLUDES THE
ADJUSTED RETIRED PAY IN THE AMOUNT OF \$227.18
(GROSS), FOR THE INCLUSIVE PERIOD 7 OCTOBER
1975 (EFFECTIVE DATE OF LEGISLATION) TO
29 FEBRUARY 1976.

"YOUR MONTHLY GROSS ADJUSTMENT IS \$47.33.

^{1/} Section 806 of the Department of Defense Appropriation Authorization Act, 1976, Public Law 94-106, October 7, 1975, 89 Stat. 531, 538-539, amending 10 U.S.C. § 1401a.

"YOUR MARCH 1976 RETIRED PAY
WILL BE:
After CPI increase

YOUR APRIL 1976
(NEW NORMAL) RETIRED
PAY WILL BE:
After CPI increase

TAXABLE GROSS	\$1,968.69	\$1,741.51
GROSS	<u>1,968.69</u>	<u>1,741.51</u>
FEDERAL TAX	<u>339.80</u>	<u>272.60</u>
ALLOTMENTS	<u>28.30</u>	<u>28.30</u>
SBP	<u> </u>	<u> </u>
RSFPP	<u> </u>	<u> </u>
SUNDRY	<u> </u>	<u> </u>
NET	<u>\$1,600.59</u>	<u>\$1,440.61"</u>

Commander Stewart received retired pay for the month of March 1976 in the net amount of \$1,600.59. As indicated in the document, this amount included the additional retired pay (backpay) that was due to him for the previous 5 months.

Through administrative error, however, Commander Stewart's new normal net retired pay was not reduced to the amount of \$1,440.61 in April 1976, as the document indicated it should have been. Instead, he continued to receive retired pay in the following months in the net amount of \$1,600.59. Moreover, when subsequent Consumer Price Index adjustments were made in his retired pay, the error was not detected and those adjustments were made on the basis of percentage increases in the erroneous rate of pay. Coast Guard officials eventually discovered the error in 1984 in the course of a random audit. They then determined that Commander Stewart had been overpaid in the total amount of \$30,398.91 between April 1976 and May 1984.

Commander Stewart applied for a waiver of the resulting claim against him. He indicated that he had not been aware of the error. He has suggested that he also had no reason to be aware of the error because his active duty career had been in the areas of surface operations and marine inspections, and he had no experience or expertise in pay matters. He had never understood the "Tower Amendment," nor did he understand the document he had been sent in 1976 concerning the adjustment of his retired pay because of that amendment. He further indicated that requiring him to refund the overpayments he had received would cause financial hardship. In addition, he suggested that if he was nevertheless

found liable in the matter, then his repayment obligation should be limited to 10 percent of the total amount since the Coast Guard had caused the error and should bear the primary responsibility for it.

Our Claims Group denied his application for a waiver, and he has requested further review and reconsideration of the matter.

Analysis and Conclusion

Section 2774 of title 10, United States Code, authorizes the Comptroller General to waive the claim of the United States against a member or former member of the uniformed services arising out of an erroneous payment of pay or allowances if collection "would be against equity and good conscience and not in the best interest of the United States." 10 U.S.C. § 2774(a). That section further provides, however, that the Comptroller General may not waive a claim if there exists, in connection with the claim, an indication of "fault" on the part of the concerned service member. 10 U.S.C. § 2774(b)(1).

We define the term "fault," as used in 10 U.S.C. § 2774, as including something more than a proven overt act or omission. "Fault" is considered to exist if in light of all the facts it is determined that the service member knew or should have known that an error existed and should have taken action to have it corrected. Thus, if the member is furnished with documentary records or information which, if reviewed, would cause a reasonably prudent person of the same rank and experience to be aware of or suspect the existence of error, but the member fails to review the documents carefully or otherwise fails to take corrective action, the member is not without fault and waiver will be denied.^{2/}

^{2/} 4 C.F.R. Part 91; Price v. United States, 621 F.2d 418 (Ct. Cl. 1980); Veterinary and Optometry Officers, 56 Comp. Gen. 943, 951-953 (1977). Lieutenant Colonel Joseph D. McDonald, USAR (Retired), B-217914, June 11, 1985; Lieutenant Colonel Roger B. Files, USAF (Retired); B-216951, April 12, 1985; Commander George W. Conrad, USCG (Retired), B-217241, April 9, 1985; Lieutenant Commander Ronald W. Phoebus, USN, B-197275, March 21, 1980.

The fact that the overpayments were made through administrative error does not relieve the recipient of the responsibility of exercising due care and taking corrective action. We have held that if the concerned service member is even partially at fault, waiver is completely precluded notwithstanding that the overpayments may have initially occurred through administrative errors not caused by him, and a partial waiver may not be granted on the basis that the service member was only partially at fault. Moreover, a service member's general conduct, exemplary record of service and the fact that collection of the overpayments may result in financial hardship, are not factors that may properly be considered in determining whether the member is without fault and eligible for a waiver under the provisions of 10 U.S.C. § 2774.^{3/}

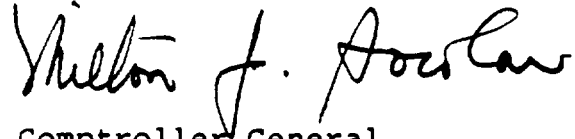
In the present case, Commander Stewart was furnished with a written notice plainly informing him that the net amount of his retired pay for the month of March 1976 would be \$1,600.59, and that the net amount of his normal monthly retired pay thereafter would be \$1,440.61. We find that a reasonably prudent person of Commander Stewart's rank and experience would have understood from this notice that his net retired pay entitlement for April 1976 was approximately \$1,440, and would have noticed and reported the substantial overpayments. Had Commander Stewart taken this appropriate action, the error would doubtless have been corrected immediately. Hence, we conclude that he was partially at fault in the matter for failing to take corrective action, and we are therefore unable to give favorable consideration to his waiver application. As indicated, we cannot grant a waiver solely on the basis of hardship, nor may we allow a partial waiver on the basis that he was only partially at fault.

^{3/} Lieutenant Colonel Joseph D. McDonald, USAR (Retired), B-217914, supra; Chief Petty Officer William F. Seacrest, Jr., USN, B-201814, September 18, 1981; Captain Donald Reid, USN (Retired), B-197627, June 3, 1980; Lieutenant Commander Melvin W. Mills, USN (Retired), B-194738, February 29, 1980.

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B-219004

Accordingly, we sustain our Claims Group's denial of Commander Stewart's waiver application.

A handwritten signature in cursive script, reading "Milton J. Douglas".

Acting Comptroller General
of the United States